

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

BRAWLEY BEEF, LLC

and

Case 21-CA-35031-1

MARTHA MARQUEZ, An Individual

and

Case 21-CA-35031-2

LORENA RIVAS, An Individual

Stephanie Cahn, Esq., of Los Angeles,
California, for the General Counsel.

Gregg J. Tucek, Esq., of Phoenix,
Arizona, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me on January 22, 2003, at El Centro, California, upon the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* by terminating the two charging parties on March 15, 2002,¹ for having engaged in protected, concerted activity.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Martha Marquez and Lorena Rivas were discharged because they refused to do their assigned work.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

¹ All dates are in 2002, unless otherwise indicated.

I. JURISDICTION

The Respondent is a California corporation engaged in the business of beef processing at a facility in Brawley, California. In the course and conduct of this business, the Respondent annually purchases and receives at goods, products and materials directly from points outside the State of California valued in excess of \$50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

The Respondent began operations on December 24, 2001, and now has about 700 employees engaged in various aspects of beef processing. Included in this process is the operation of Super Vac machines on six lines. Machine operators pick up cuts of meat and from a conveyor belt and place them on a machine to be sealed, vacuumed and dried. Line No. 1 processes beef rounds, which weigh an average of 10 pounds; however, Martha Marquez testified that at least on her last day, in addition to rounds there were other, heavier, cuts. Typically two employees are assigned to a machine.

On March 15, Marquez was assigned as the operator on Line 1 and after a short time, Rivas was assigned to help on Line 1. Rivas had returned to full duty that day, having worked the previous three months on limited lifting due to a hand injury. Marquez testified that the meat she was lifting was not too heavy, but cuts that Rivas had, apparently from another conveyor belt, were heavy. Rivas complained to Marquez about the heaviness of the meat she had to lift and Marquez agreed, having come over to Rivas' side to help her. They discussed this issue, although continuing to work, and concluded that a man should be assigned to the line to help lift the heavier cuts.

They complained to Cecilio Albanez, the trainer, who helped for a while, and then he left. They subsequently complained to Carman Clayton, a lead person under Debbie Regino, the then supervisor in packaging. Clayton said she would talk to Regino. Clayton returned and told them that Regino said they had to do their job. Later Marquez told Clayton they wanted to speak to the supervisor above Regino and unable to do so, asked to speak to Jose Castaneda, the fabrication superintendent. Then about 10:30, Patricia Madrano, another lead person, told them to report to Personnel after lunch.

According to Regino, Albanez came to her and said that Marquez and Rivas "were refusing to do the work. That they did not want to be on that line." She told him to tell Marquez and Rivas that they had just started their rotation (a system put into effect the day before) and they would have to work on that machine for a week. Then Madrano told Regino that Marquez Rivas "didn't want to be on that machine because the product was too heavy, and they were refusing to do the work over there." That they were actually refusing to work Regino knew not to be true, since she asked "Are they keeping up?" and Madrano told her they were. Then somewhat later, Clayton came to her with a report that Marquez and Rivas "did not want to be on that machine, that the meat was heavy. . . ." Regino also asked Clayton "if everything was running okay, and she said yes."

Regino testified that after finished what she was doing, and after a second report that Marquez and Rivas wanted to talk to Castaneda, she went looking for Castaneda. She could not find him, but she did locate Sam Falk, who apparently is the next step above Castaneda. She explained the situation to Falk who told her, since she had explained the rotation system to everyone the day before, she should send Marquez and Rivas to Human Resources.

Regino reported to Elizabeth Cota, the Human Resources Manager. Cota told Regino to prepare separation notices for Marquez and Rivas and to have them report to her after lunch. Cota testified that her investigation consisted only of reviewing the personal files of Marquez and Rivas and talking to Regino. Cota testified that she first talked to Marquez and Rivas separately and then to them together in the presence of Regino. As a result of these discussion, Cota decided to discharge them and signed the previously prepared separation notices, which read in material part:

What was the Final Circumstance Leading to Separation? (Printed on form.) Unsatisfactory Employee. Unwilling to do the work required. Complaining of work too hard, too heavy, too fast etc. The two former operators are women & able to do the work. (In handwriting, presumably Regino's.)

Cota testified that they were before her "because I wanted to make sure that they were not refusing to do the job, but I asked them, I asked Lorena and Martha, 'If I put you back on the line, are you going to do the job,' and they said, 'No, we're not going to do that job.' And so after hearing them say that, then that's when I used Debbie's form, the separation notice. I used it to terminate their employment with us."

Marquez and Rivas denied that they were asked by Cota if they would do their job and said they would not.

B. Analysis and Concluding Findings

The General Counsel contends that the Respondent terminated Marquez and Rivas for engaging in concerted activity protected by the Act – complaining about the heavy lifting they were required to do. The Respondent argues that they were not discharged for complaining. They were discharged because they had refused to do their job and when asked by Cota if they would work on the line, they said they would not.

There is little question that the weight required to be lifted is a working condition and that the complaints by Marquez and Rivas were concerted. See generally *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reafld. 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) cert. denied 487 U.S. 1205 (1988). While the *Meyers* holding has been recently questioned by former Chairman Gould and former Member Browning without elaboration [*Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995); *Liberty Natural Products, Inc.*, 314 NLRB 630 (1995)] it continues to form the basis for analyzing when activity of employees is concerted. Though in the very early stages of what might have lead to group action, I conclude that the joint complaints by Marquez and Rivas amounted to concerted activity. I note that the heaviness issue was first raised by Rivas, since she had just returned from limited

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ²

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ORDER

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The Respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

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a. Discharging or otherwise discriminating against employees because they make concerted complaints about wages, hours and other terms and conditions of employment.

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b. In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

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a. Offer Martha Marquez and Lorena Rivas, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

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b. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, will not be used against them in any way.

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c. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5 d. Within 14 days after service by the Region, post at its facility in El Centro,
California, copies of the attached notice marked "Appendix."³ Copies of the
notice, on forms provided by the Regional Director for Region 21, after being
signed by the Respondent's authorized representative, shall be posted by the
Respondent immediately upon receipt and maintained for 60 consecutive
10 days in conspicuous places including all places where notices to employees
are customarily posted. Reasonable steps shall be taken by the Respondent
to ensure that the notices are not altered, defaced, or covered by any other
material. In the event that, during the pendency of these proceedings, the
Respondent has gone out of business or closed any facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, a
copy of the notice to all former employees employed by the Respondent at
any closed facility since the date of this Order. The notices will be both in
15 English and Spanish.
- e. Within 21 days after service of this Order, inform the Region, in writing, what
steps the Respondent has taken to comply therewith.
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Dated San Francisco, California, March 18, 2003.

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James L. Rose
Administrative Law Judge

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against our employees because they concertedly complain about wages, hours or other terms and conditions of employment.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Martha Marquez and Lorena Rivas reinstatement to their former jobs and we will give them backpay, with interest, and otherwise make them whole for any losses they may have suffered as a result of our discrimination against them.

Brawley Beef, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street – 9th Floor
Los Angeles, CA 90017-5449

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER. Telephone 213-894-5229

